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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 22

TIME, INC.,
Appellant,

against

JAMES J. HILL,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, ON REARGUMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BARRY MAHONEY
BRENDA SOLOFF
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Preliminary Statement

The Attorney General of the State of New York, as *amicus curiae*, adheres on this reargument to his initial position that the purported conflict between the First Amendment and New York's privacy law is illusory. The statute, we submit, is a narrow one, born of a felt necessity to protect against the commercial exploitation of an individual's name and personality without his consent, but wholly consistent, in origin and in application, with the constitutional guarantee of a free press.

Questions Presented

Our discussion herein is centered upon the questions posed by the Court in its order directing reargument, to wit:

(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?

(2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

> "However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized."

(3) Does the concept of "fictionalization", as used in the charge, the intermediate appellate decisions in this case, and in other New York cases, require intentional fabrication, or reckless disregard of the truth or falsity of statements of fact, as a condition of liability? Would either negligent or non-negligent misstatement suffice? With respect to these issues, how should the instructions to the jury be construed?

(4) What are the First Amendment ramifications of the respective answers to the above questions?

Summary of Argument

1. The New York privacy statute, by its terms and as construed by the New York courts, is applicable only to the use of an individual's name or likeness for solely commercial purposes; it does not extend to the truthful presentation of a newsworthy item. Even if the statute could be read as making such a presentation actionable, however, a challenge predicated upon that possibility should not be entertained by the Court in this case—the hypothetical possibility of an application of the statute to truthful presentations is not relevant to the outcome of the tort litigation beween these two private parties in view of the state courts' express finding that appellant's presentation of the 1952 Hill incident was false, and the challenge itself was never made in the courts below.

2. The concurring opinion of Judge Rabin in the Appellate Division, insofar as it suggested that the truthful presentation of a newsworthy item should be actionable where it is demonstrated that the item is not presented for the purpose of disseminating news but rather for the sole purpose of increasing circulation, went well beyond the facts of this case. It is dictum and, as such, was not adopted by the Court of Appeals as part of the law of New York. In any event, however, the proposed rule is not necessarily inconsistent with the First Amendment; it would seem to be directed at the publication of essentially private facts and would require that a plaintiff "clearly demonstrate" that the exploitation of his personality had no news purpose.

3. The concept of fictionalization, as used in this and in other New York cases, requires intentional fabrication or deliberate disregard of the truth or falsity of statements presented as fact. The word itself connotes deliberate,

purposive action. Where a publisher consciously alters an individual's relationship to reality, he is not attempting to state facts; he is attempting to convey an impression for his own commercial purposes. While a presentation may sometimes be found to be factual as a matter of law despite some misstatements (*e.g., Koussevitzky* v. *Allen Towne & Heath*, 188 Misc. 479, aff'd 272 App. Div. 759 [1st Dept. 1947]), this is often a question for the trier of fact. The greater the departure from truth, the stronger the inference that the publisher was not attempting to present facts but rather was simply trying to create an impression for his own commercial purposes without regard to the truth or falsity of his presentation.

4. The relevant issue on this appeal is the application of the statute in *this* case to redress injury to the plaintiffs resulting from the commercial exploitation of their name in a manner which was false and which served no news or informational purpose. The use of the Hills' name in the present case was simply a "gimmick", involving neither a public issue nor a public official. Such a use makes no meaningful contribution to the interchange of ideas and is not entitled to constitutional protection. The New York statute provides a minimal amount of protection for a fundamental interest—the interest in being let alone. It should not be invalidated on the basis of a hypothetical possibility of misapplication.

ARGUMENT

1. (a) The truthful presentation of a newsworthy item is not ever actionable under the New York statute, either on its face or as construed.

The New York privacy statute was enacted by the Legislature in 1903, in direct response to the decision in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902), a 4-3 decision which was strongly criticized

by both the bar and the press.[1] The words of the statute, and the context in which it was enacted, make it quite clear that the statute was aimed at a particular kind of wrong, of which *Roberson* and the present case are clear examples—the use of an individual's name or picture, without his consent, for solely commercial purposes and not for the dissemination of news and ideas.

The relevant words—"for advertising purposes or purposes of trade"—clearly imply that the statute is limited to uses for solely commercial purposes. The Legislature of 1903 can hardly be assumed to have been ignorant of the fact that items in a commercial publication very often have the dual purposes of increasing the publisher's circulation and of conveying news, information and ideas, nor can it be assumed to have acted in disregard of New York's constitutional guarantee against the passage of any law designed to "restrain the liberty of speech or of the press".[2]

Moreover, the statute has from the beginning been construed by the New York courts as inapplicable to the dissemination of news, information and ideas. See, *e.g.*, *Jeffries* v. *New York Evening Journal Pub. Co.*, 67 Misc. 570, 571, 124 N. Y. Supp. 780, 781 (Sup. Ct., N. Y. Co. 1910); *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 55-56; 103 N. E. 1108, 1110 (1913). We know of no case, and appellant has cited none, in which recovery has ever been allowed under the statute for the news report of a current news event. In fact, in each of the five cases cited by the appellant for the proposition that New York makes actionable the truthful presentation of newsworthy items, the truthfulness of the presentation is questionable, the newsworthiness of the

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[1] See Hofstadter and Horowitz, THE RIGHT OF PRIVACY, pp. 26-28; Prosser, TORTS, p. 828 (3d Ed. 1964).

[2] The guarantee was contained in New York's first post-Revolutionary Constitution (Const. 1821, Art. VII, § 8) and has been retained in every succeeding Constitution (since 1846, in Art. I, § 8).

challenged item is open to doubt, the items were not presented as "news", and the exploitation of the plaintiff is apparent.

In *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y.S. 800 (1st Dept. 1932), aff'd 261 N. Y. 504, 185 N. E. 713 (1933), the item which was the subject of the lawsuit (a movie sequence showing a woman selling bread and rolls) is of doubtful inherent newsworthiness and the presentation (a six-second closeup of the woman which depicted her in a foolish and unnatural manner, and which was part of a film featuring professional comics as sightseeing guides in New York City) cannot fairly be said to be a truthful portrayal of the plaintiff. The extended closeup, shown in the context of a commercial motion picture produced as an entertainment piece, obviously was not presented to the public as news; on the contrary, the clear purpose was to amuse the public at the expense of Mrs. Blumenthal.

Two of the other cases upon which the appellant relies, *Redmond* v. *Columbia Pictures Corp.*, 253 App. Div. 708, 1 N.Y.S. 2d 143 (1st Dept. 1937), aff'd 277 N. Y. 707, 14 N. E. 2d 636 (1938) and *Franklin* v. *Columbia Pictures Corp.*, 246 App. Div. 35, 284 N.Y.S. 96 (1st Dept. 1935), aff'd 271 N. Y. 554, 2 N. E. 2d 691 (1936), are similar in that the plaintiffs in those cases—a trick shot golfer and a bullfighter, respectively—were presented in a context substantially different from that in which their activities actually took place. In these cases, too, the films of the plaintiffs, incorporated into humorous commercial movies, cannot be said to have been presented as news; the plaintiffs were the unwitting victims of commercial exploitation.

Binns v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913) and *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N.Y.S. 2d 233 (1st Dept. 1950), are cited by the appellant as examples of cases where liability is found "where the account is essentially true but contains some inaccuracies" (Rearg. Br., p. 6). In *Binns*, however, the account (in the

form of a motion picture purporting to depict a sea collision in which the plaintiff was a hero) was concededly a product of the imagination (210 N. Y. at 56, 103 N. E. at 1110) and the defendant, employing professional actors, had included a scene which had no factual basis at all and in which the plaintiff was portrayed in a manner which was false and which made him appear ridiculous (210 N. Y. at 58, 103 N. E. at 1111). In *Sutton*, the Appellate Division merely held that it was for the jury to determine whether plaintiff's allegations—charging that an illustrated article appearing in the magazine section of the defendants' publication had falsely portrayed her as having accepted a romantic bequest of one rose a week—were true and, if so, whether the complained of article was published for solely commercial purposes (*Sutton, supra*, 277 App. Div. at 156-157, 98 N.Y.S. 2d at 234).[1]

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[1] The magazine article in the *Sutton* case had related the story of a turret gunner named Val Lawless, who was killed in action during World War II, and whose bequest to the plaintiff of one rose a week had not been accepted by her. The article suggested that Lawless and the plaintiff, who had been co-workers before the War, might have had occasional social engagements together outside of their office, and the text of the article was accompanied by sketches of a turret gunner in a Flying Fortress and a woman tenderly cupping a rose and apparently looking at the gunner. The plaintiff contended that the total dominant impression created was not a true representation of the actual facts, but was a dramatic fiction, presented for trade purposes. Far from finding fictionalization and imposing liability as appellant suggests (Br., pp. 19, 22; Rearg. Br., pp. 6-7), the Appellate Division majority in *Sutton* held only that it was for the trier of fact to determine whether the article and its surrounding illustrations were limited to reporting fairly past or current events, or were published, as alleged, to amuse and astonish the reading public, not for the purpose of disseminating news but for the purpose of increasing the publisher's profits through increased circulation resulting from the exploitation of the plaintiff. The Court noted that because of the procedural context in which the case came before it (on appeal from denial of a motion to dismiss the complaint), it could not go outside the complaint and the annexed article, and was required to assume the truth of plaintiff's allegations of fact, to resolve every intendment and fair inference in favor of the pleading, and to uphold the denial of the motion to dismiss if upon any aspect of the facts stated the plaintiff could recover.

As the *Sutton* case demonstrates, the truthfulness and newsworthiness of a particular item are not always so clear as to be ascertainable as a matter of law. In the case of a newspaper or magazine article, for example, a presentation may depart from absolute truth to varying extents depending upon the precise words used, the inclusion or exclusion of related facts, and the juxtaposition of written matter with photographs or drawings, to suggest just a few of many possibly relevant factors. Similarly, the newsworthiness of an item may depend upon a wide variety of factors and may include, where the item concerns an individual, the extent to which he has brought himself into the public light, the extent to which the subject matter is already one of public interest, and the length of time which has passed since the event described took place.

In the large number of cases where newsworthiness and truthfulness are apparent as a matter of law, a case may not even be submitted to the trier of fact (see, *e.g.*, *Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 360, 107 N. E. 2d 485 [1952]; *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S. 2d 779 [Sup. Ct. N. Y. Co.], aff'd 272 App. Div. 795, 69 N.Y.S. 2d 432 [1st Dept. 1947]). Where, however, reasonable men may differ on whether an item is newsworthy and has been truthfully presented, liability may be found—if, upon a consideration of all the circumstances, the jury finds that the item was in essence a fictional creation in which the use of the plaintiff's name or picture was for solely commercial purposes.

(b) Appellant does not have standing to challenge the statute in this case on the basis of a hypothetical possibility that the statute might be applied to the truthful presentation of a newsworthy item.

Even if New York's statute could be read as allowing liability for the truthful presentation of a newsworthy item, the present case is not one in which a challenge predi-

cated upon that possibility should be entertained by this Court.

First, appellant's conclusory and self-serving assertion that the article was "basically true" notwithstanding, the state courts have expressly found that appellant's presentation of the Hills' 1952 incident was *not* truthful. The complaint alleged that the presentation was false (R. 10-12); substantial evidence of alteration of the true facts was presented at the trial (see *Amicus* Brief, pp. 5-7, Brief for Appellee, pp. 3-17, and record references therein), the jury was charged, *inter alia,* that in order to find for the plaintiffs they must find that appellant "altered or changed the true facts concerning plaintiff's relationship to The Desperate Hours so that the article as published constituted substantially fiction or a fictionalized version for trade purposes" (R. 300); the majority and concurring opinions in the Appellate Division agreed that the Life article had falsely depicted the play as a re-enactment of the Hills' experience (R. 438-39, 441); and the Court of Appeals affirmed that holding. The hypothetical possibility that the statute might sometime be applied to the truthful presentation of a newsworthy item is thus not relevant to the controversy between the two parties in this litigation.

United States v. *Raines,* 362 U. S. 17 (1960), is directly in point. In that case a federal district court had dismissed an action brought under Section 131 of the Civil Rights Act of 1957 on the ground that the statute, on its face, was susceptible of unconstitutional application in that it allowed the United States to enjoin purely private action designed to deprive citizens of their right to vote on account of their race or color (172 F. Supp. 552). This Court reversed, holding that the District Court had erred in considering the constitutionality of the statute on the basis of a hypothetical situation (362 U. S. at 20-24) and that the statute was unquestionably valid as applied to the charges in the complaint (*id.* at 26). The observations of Mr. Justice Bren-

NAN concerning the Court's exercise of its power to declare a statute unconstitutional are pertinent to the present case (*id.* at 21-22):

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N. Y. & P.S.S. Co. v. Commissioners of Emigration, 113 U. S. 33, 39, 28 L. Ed. 899, 901, 5 S. Ct. 352. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional [citations omitted]. In Barrows v. Jackson, 346 U. S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Id. 346 U. S. at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary

pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."

See also *Poe* v. *Ullman*, 367 U. S. 497 (1961) (opinion of FRANKFURTER, J.); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-48 (1936) (concurring opinion of BRANDEIS, J.).

Second, appellant's contention that it should be allowed to challenge the constitutionality of the statute even if its presentation was not true (Rearg. Br. pp. 7-10) wholly ignores the procedural context in which this case comes before the Court. This is a tort action involving two private parties, in which the gravamen of the complaint was the false use of the plaintiff's name for trade purposes. The constitutionality of the statute itself was never attacked in the state courts; on the contrary, the litigation in the state courts involved only the narrow issues relating to proof of that private wrong. The constitutionality of the statute was challenged only insofar as it was applied to permit recovery by the plaintiff in this case; indeed, the amended remittitur of the Court of Appeals states expressly that the constitutional question passed upon by the Court was whether the privacy law "as applied to defendant" was invalid under the First and Fourteenth Amendments to the Constitution of the United States (R. 458).

Appellant's belated attempt to challenge the statute on its face stands in striking contrast to the manner in which the challenges were made in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) and *NAACP* v. *Button*, 371 U. S. 415 (1963). In those cases the statutes on their faces clearly applied to the activities of the plaintiffs, and the extent of their apparent reach was attacked directly in the complaints. In the instant case, the statute's breadth was never questioned in the state courts and should not be at issue here. In this regard, the appellant is in effect seeking to initiate an *ad hoc* declaratory judgment proceeding

in this Court,[1] whereas the only issue properly before the Court is the correctness of the New York courts' determination that the statute was constitutionally applied to permit recovery for the plaintiff in the circumstances of this case.

2. The *per curiam* opinion of the New York Court of Appeals should not be read as adopting Judge Rabin's dictum insofar as it suggests that truthful presentation of a newsworthy item should be actionable under the statute.

In affirming on the majority and concurring opinions in the Appellate Division, the Court of Appeals adopted them as the law of New York only insofar as they were concerned with the facts of the instant case. The principle is well established in New York, as in most other jurisdictions, that an opinion is authority only with respect to the point actually decided. See, *e.g.*, *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 88, 193 N. E. 897, 902 (1934); *Crane* v. *Bennett*, 177 N. Y. 106, 112, 69 N. E. 274 (1904). Judge Rabin's concurring opinion, insofar as it suggested that truthful presentation of a newsworthy item should be

[1] The possibility of liability under the statute for the truthful presentation of a newsworthy item could be tested in a declaratory judgment proceeding in New York. N. Y. Civil Practice Law and Rules § 3001; *New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941); *Bunis* v. *Conway*, 17 App. Div. 2d 207, 234 N.Y.S. 2d 435 (4th Dept. 1962). The existence of a justiciable controversy would, of course, have to be shown in such a proceeding, and a record could thus be developed upon which to evaluate what is now simply a bald assertion on the part of the appellant that the New York statute is applicable to the truthful presentation of newsworthy items. In addition, State officials could have an opportunity to defend the statute's constitutionality from the outset. See N. Y. Executive Law § 71; compare 28 U.S.C. §§ 2281, 2284(2). Significantly, in each of the cases relied upon by appellant in connection with his claim of standing to challenge the scope of the statute beyond its application to the facts of this case (Rearg. Br., pp. 7-10), a government official or governmental entity was a party throughout the litigation.

actionable where it is demonstrated that the item is presented not for the purpose of disseminating news but rather for the sole purpose of increasing circulation, went beyond the facts of this case. It is dictum and, as such, is clearly not a part of the law of New York. *In re Smathers' Will*, 309 N. Y. 487, 495, 131 N. E. 2d 896, 900 (1956); *Roberson* v. *Rochester Folding Box Co.*, *supra*, 171 N. Y. at 551, 64 N. E. at 445-446.

In any event, however, it would seem that Judge Rabin's proposed rule is not necessarily inconsistent with the First Amendment. Even the appellant acknowledges that there are some areas—*e.g.*, the raking up of long forgotten misconduct, electronic spying on a couple's private sex life, or photographic harassment of a non-public person in his day-to-day life—where a publication may have less claim to constitutional protection (see Appellant's Br. on Rearg., p. 38). These would seem to be the kind of publications with which Judge Rabin was concerned. Where an individual was exploited in such a publication, and could clearly demonstrate that the publication was not for news purposes, his claim to redress would be strong; there is no public interest in such exploitation. *Cf. Garrison* v. *Louisiana*, 379 U. S. 64, 72 n. 8 (1964); *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966).

3. The concept of fictionalization requires intentional fabrication or deliberate disregard of the truth or falsity of statements of fact. Negligent or non-negligent misstatements will not suffice, and the jury was properly instructed in this regard.

Fictionalization is a term used to describe both a process and a result. The word itself implies some kind of deliberate, purposive action; a process of alteration of facts which results in the creation of a piece of fiction for purposes other than the dissemination of news or information. Where a publisher fictionalizes an individual's relationship to reality, he is not attempting to state facts; he

is concerned with conveying an impression for his own commercial purposes. As used in the charge and in the Appellate Division opinions in the instant case, and in other New York cases, the concept of fictionalization clearly requires intentional fabrication or deliberate disregard of the truth or falsity of statements of fact as a condition of liability for the use of an individual's name.

The charge directed the jury's attention to the truth or falsity of the article and to the intent of the publisher, *i.e.*, to whether TIME, INC. was attempting to convey news or information in its use of the Hills' name. The charge made it clear that an incidental misstatement of fact would not render the defendant liable (R. 300-301):

> "It is for you to determine whether, in publishing the article, the defendant Time, Incorporated altered or changed the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially fiction or a fictionalized version for trade purposes; that is to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit. If you feel that the defendant Time, Incorporated did publish the article, not to disseminate news, but was using plaintiffs names, in connection with a fictionalized episode as to plaintiffs' relationship to the Desperate Hours, your verdict must be in favor of the plainiffs.
>
> Of course, incidental mistake in the statement of a fact or facts does not render the defendant liable. The privacy law is not violated merely because of some incidental mistake of acts, or some incidental incorrect statement.
>
> Before the plaintiffs can be entitled to a verdict against the defendant Time, Incorporated, you must find that the statements concerning the plaintiffs in the article constituted fiction, as compared with news, or matters which were newsworthy, and that they were

published for purposes of trade; that is to increase circulation or enhance the standing of the magazine with its readers, or you must find that the defendant Time, Incorporated in the preparation and publication of the article did so to advertise The Desperate Hours for the purpose of increasing the play's patronage.

Unless you find that the defendant Time, Incorporated published a fictionalized article for its own purposes or that it published the article in question as an advertising medium to increase patronage for the play, your verdict must be in favor of the defendant Time, Incorporated.

If, on the other hand, you are satisfied from the evidence that the defendant Time, Incorporated was not, so far as the plaintiffs are concerned, reporting fairly past or current events, but was publishing a fictionalized account mentioning the names of the plaintiffs for the purposes of trade; that is for the publisher's profits through increased circulation, induced by exploitation of the plaintiffs, or that the defendant Time, Incorporated published the article for the purpose of advertising the play, your verdict should be in favor of the plaintiffs against the defendant Time, Incorporated."

The majority opinion in the Appellate Division focused upon three elements: the evidentiary facts demonstrating that the play was a work of fiction; the fact that the author of the play had stated, in an article published in the New York Times only a month prior to the publication of the Life article and readily available to the appellant, that the play was fictionalized; and the fact that the appellant had not sought to ascertain from the author whether the play was actually an account of what had happened to the Hills (R. 436-437, 439). These elements demonstrate, at the very least, the appellant's deliberate disregard of the truth or falsity of its state-

ment that the play was a re-enactment of the Hills' experience. Judge Rabin's concurring opinion, emphasizing that the appellant had represented the play as a true version of the event when in fact it was not and that the representation was not for the purpose of disseminating news (R. 441, 442), is similarly focused upon the intent of the publisher.

The use of the concept of fictionalization in the present case is consistent with its use in other cases. In *Spahn* v. *Julius Messner, Inc.*, 23 App. Div. 2d 219, 260 N.Y.S. 2d 451 (1st Dept. 1965), the publisher of a purported biography of a famous baseball pitcher had concededly made use of imaginary incidents, manufactured dialogue, and a manipulated chronology, for the avowed purpose of attracting juvenile readership. A verdict for the plaintiff was upheld, in an opinion which emphasized the distinction between an intentionally fictionalized treatment and a straight factual treatment containing some inaccuracies. The elements of intentional fabrication, deliberate disregard of the truth or falsity of statements of fact, use of a living individual's name without his consent, and the absence of any news purpose were all clearly present in *Spahn*, as they were in *Binns* v. *Vitagraph Co.*, *supra*, and the finding of a use of the name for trade purposes in violation of the statute followed naturally.

Whether a treatment is factual or fictional is, of course, not always easily ascertainable, but is obviously quite relevant to an ultimate determination of whether a use was for trade purposes. The greater the departure from truth, the stronger the inference that a publisher was not attempting to state facts but rather was simply trying to create an impression for his own commercial purposes—*e.g.*, to amuse, thrill, astonish or move the reading public so as to increase circulation or for some other material benefit—without regard to the truth as falsity of his statements. While a treatment may sometimes be found to be factual as a matter of law despite some mis-

statements (*e.g., Koussevitzky* v. *Allen, Towne & Heath, supra*), this is often a jury question (*cf. Youssouppoff* v. *Columbia Broadcasting System, Inc.*, 41 Misc. 2d 42, 244 N.Y.S. 2d 701 [Sup. Ct., N. Y. Co], aff'd 19 App. Div. 2d 865, 244 N. Y. S. 2d 1 [1st Dept. 1965]; *Thompson* v. *Close-up Inc.*, 277 App. Div. 848, 98 N.Y.S. 2d 300 [1st Dept. 1950]; *Sutton* v. *Hearst Corp., supra*). Where a treatment of an individual is not factual as a matter of law, the extent of the departure from truth, together with whatever other evidence there may be with respect to the purposes of the departure from truth, are basic to a determination of the statute's applicability.[1]

4. New York's law of privacy, and the application of that law in the present case, are wholly consistent with the constitutional guarantee of a free press.

We have sought to demonstrate in the preceding pages that the New York privacy statute does not apply to the truthful presentation of newsworthy items and should not be invalidated on the basis of a hypothetical possibility, not relevant to the outcome of this tort action, of its misapplication. Rather, we submit, the only issue on this appeal is the constitutionality of the statute's application

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[1] Thus, for example, the manner of presentation—*e.g.*, in the form of a humorous commercial movie (see discussion of the *Blumenthal, Redmond* and *Franklin* cases, *supra*)—may tend to negate any contention that the presentation involving the individual had any news or informational purpose. In the present case, in addition to the evidence of falsity in the presentation, there is evidence that the LIFE editors regarded the use of the Hills' name and prior experience simply as a "gimmick" to increase reader interest (*e.g.*, R. 163-164); that they ignored an article by the author of the play, contained in LIFE's story file (which Editor Prideaux testified that he read at the time he wrote the article), which made it clear that the play was a fiction based on a number of news stories about incidents occurring in various parts of the country (see R. 196-198, 382-385); and that they never discussed the extent of the relationship between the play and the 1952 incident involving the Hills with the author of the play (R. 108, 144-145, 176-182).

in *this* case—to redress injury to the appellee resulting from the use of his name in an article which the trier of fact and the reviewing state courts found to be a fiction which was not presented for news purposes.

In its reply brief and in its brief on reargument, the appellant has claimed First Amendment protection on the basis of the subject matter of its article, arguing that in describing a play dealing with crime it was attempting to discuss a public issue. Not only does an examination of the article itself cast considerable doubt upon that argument, but the argument itself ignores the fact that the subject matter of the article did not require the use of the Hills' name. Whatever may have been the social value of an article dealing with the opening of the play, the only purpose of the false use of the Hills' name and former home was to lend dramatic impact to the article—to provide, in the words of a LIFE "researcher" testifying as to the circumstances under which the article was planned, an "interesting gimmick" (see R. 163-164).

Such a use, we submit, is simply not entitled to constitutional protection. Appellant's reliance upon *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), for the proposition that its false depiction of the Hills' relationship to *The Desperate Hours* is protected by the First Amendment is wholly misplaced. The protection accorded to false statements under the *Times* rule is limited to statements about the official conduct of public officials, and the reason for the protection is made clear in the opinion in that case and the libel cases which have followed—such statements may make a valuable contribution to free and open debate on public issues and about persons who are in a position significantly to influence the resolution of those issues. *New York Times* v. *Sullivan*, *supra*, at 279 n 19; *Rosenblatt* v. *Baer*, 383 U. S. 75, 85 (1966); *cf. Garrison* v. *Louisiana*, 379 U. S. 64, 73 (1964). In the present case, however, the victim of the false statement was not a public official and the conduct which was the

subject of the publication was not in any manner official conduct. Whatever debate might have been produced by a "collision" between LIFE's falsehoods and plaintiffs' assertion of the truth (*cf. New York Times Co.* v. *Sullivan*, *supra*, at 279 n. 19) would have been far removed from the debate about and criticism of government which is "at the very center of the constitutionally protected area of free discussion" (*Rosenblatt* v. *Baer*, *supra*, at 85). Moreover, it is doubtful that any meaningful collision between truth and error can occur at all where, as here, the victim of the exploitation is a private individual without the forums for rebuttal which are available to a public official.

The New York law of privacy, enacted for a limited purpose and construed narrowly over a sixty-three year period, represents a minimal attempt to protect living persons from the appropriation of their name and personality in a manner which makes no contribution to the dissemination of news and information or to the interchange of ideas. It imposes no restrictions on every-day news reporting; it requires only that a commercial publisher who seeks to distort a private individual's relationship to reality first obtain the individual's consent. Such a requirement surely cannot be said to inhibit debate on public issues; it simply provides a modicum of protection for a very basic right—the right to be let alone, to be free from unwarranted and unwanted public attention. This right, too, is of constitutional dimension. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

The New York statute, designed to protect individuals from unwarranted intrusions upon their privacy, enacted and construed with careful consideration for the public interest in a free press, and applied in the present case to provide redress for injury resulting from the false use of an individual's name for purposes other than the dissemination of news and ideas, poses no threat to the

freedoms protected by the First Amendment. The purposes of the Amendment will not be furthered in any way by allowing it to become a shield for commercial exploitation of private individuals by the communications industry. The application of the statute in the present case, to redress the injury to this appellee resulting from appellant's misuse of his name, infringes no public interest. Rather, it reaffirms New York's concern for protection of the privacy of private individuals. There is present here no element which can be said to have "overborne" the interest in protection of the individual's right to freedom from false and unsought publicity. *Cf. Garrison* v. *Louisiana, supra,* at 73. The constitutionality of the statute's application in the present case is clear, and the statute should not be invalidated on the basis of a hypothetical possibility of its misapplication.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed.

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Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York, N. Y. 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BARRY MAHONEY
BRENDA SOLOFF
Assistant Attorneys General
of Counsel

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